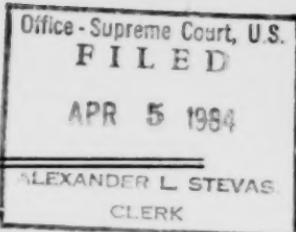


83-1645

No.



In the Supreme Court of the United States

October Term, 1983

CHARLES STRUEMPH, JOSEPH STRUEMPH,
JOHANNA STRUEMPH, STEVE HOFFMAN,
MARIE HILKE and MARTHA KEMNA,

Petitioners,

vs.

BISHOP MICHAEL McAULIFFE,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE
OF MISSOURI**

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QUESTIONS PRESENTED FOR REVIEW

Whether a state civil court constitutionally may adopt a rule of absolute compulsory deference to any decision by hierarchical church officials as to the use of parish property or whether in the instant case:

1. The Missouri Court of Appeals - Eastern District is in breach of the mandate of this court in *Jones v. Wolf*, 443 U.S. 595 (1979) because it employs an unconstitutional methodology in formulating its opinion that Roman Catholic Church doctrine and a hierarchical form of church government require civil courts to unquestioningly defer to church officials regardless of fraud or arbitrariness.

2. The opinion of the Missouri Court of Appeals - Eastern District violates the First Amendment of the United States Constitution respecting an establishment of religion, as applied to state civil courts by the Fourteenth Amendment, in that it adopts a rule of deference to the decisions of the clerical authorities of the Roman Catholic Church only on the basis that it is "peculiarly applicable to and is indeed a part of" its structure. *Struemph v. McAuliffe*, 661 S.W.2d 559, 566 (Mo. App. 1983).

3. The opinion of the Missouri Court of Appeals - Eastern District violates the equal protection clause applied to the states through the Fourteenth Amendment, because it deprives Roman Catholic parishioners, and particularly these petitioners, of the same access to civil courts afforded other citizens in that the appellate court first rules that it must resolve property disputes even though they involve church organization but then adopts an absolute rule of compulsory deference whereby any and all decisions of the officials within the church hierarchy are

final, binding, and unchallengeable regardless of their arbitrariness, thereby making the entire process futile and worthless. *Struemph v. McAuliffe*, 661 S.W.2d 559, 562, 566 (Mo. App. 1983).

4. Catholic Church officials hold ownership of parish property in trust for the benefit of the parishioners who therefore have standing in civil court to challenge the arbitrary or fraudulent use thereof.

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**PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE
OF MISSOURI**

TO: THE HONORABLE, THE CHIEF JUSTICE and
ASSOCIATE JUSTICES OF THE SUPREME
COURT OF THE UNITED STATES

Petitioners Charles Struemph, Joseph Struemph, Johanna Struemph, Steve Hoffman, Marie Hilke and Martha Kemna pray that a writ of certiorari issue to review the judgment of the Missouri Court of Appeals - Eastern District, entered in the above-entitled cause on September 6, 1983, after which petitioners' motion for rehearing and application to transfer to the Supreme Court of Missouri was denied on October 26, 1983, and petitioners' application to transfer to the Supreme Court of Missouri was denied on January 17, 1984.

THE OPINION BELOW

The opinion of the Missouri Court of Appeals - Eastern District is published at 661 S.W.2d 559 (Mo. App. 1983). It is Appendix A attached hereto.

JURISDICTIONAL STATEMENT

The judgment of the Missouri Court of Appeals - Eastern District, reversing a lower court's judgment permanently enjoining a bishop from removing certain property from a church sanctuary was entered September 6, 1983. Petitioners duly filed their motion for rehearing or transfer, which was denied by the Missouri Court of Appeals - Eastern District on October 26, 1983 (Appendix B). Petitioners duly filed their motion for transfer, which was denied by the Missouri Supreme Court on January 17, 1984 (Appendix C). The jurisdiction of this court is invoked under 28 U.S.C. 1257(3).

CONSTITUTIONAL PROVISIONS

The constitutional provisions involved are the First and Fourteenth Amendments to the Constitution of the United States, specifically the free-exercise, non-establishment and equal protection clauses.

STATEMENT OF THE CASE

Petitioners Charles Struemph, Joseph Struemph, Johanna Struemph, Steve Hoffman, Marie Hilke and Martha Kemna are members of the Holy Family Parish Church of Freeburg, Missouri, by baptism and by residing in its geographic area. Some petitioners ceased church attendance early in the dispute between the altars, while others continued attendance at least up to the time they filed this lawsuit. Persons retain their membership in the Holy Family Parish even though they attend church in another parish.

Hugh Behan was appointed pastor of Freeburg Church on November 5, 1975, by respondent Michael McAuliffe and remained so at all relevant times until mid-1980 when he was assigned by respondent McAuliffe to Immaculate Conception Church in Montgomery City, Missouri. McAuliffe is, and was at all relevant times, Bishop of the Roman Catholic Diocese of Jefferson City by appointment of the Pope and the immediate superior of Behan in the hierarchy of the Roman Catholic Church.

Holy Family Parish, Freeburg, is a parish of the Roman Catholic Diocese of Jefferson City, having been established by the Archbishop of St. Louis in 1904 and assigned in 1956 to the new diocese of Jefferson City when the diocese was established by the Pope from parts of the St. Louis Archdiocese and other dioceses of the Roman Catholic Church, a world-wide religious denomination.

During the late 1800's, Catholics in the Freeburg area were ministered to by the Jesuit missionaries who were supported by Catholics in Europe. In 1903 Archbishop Glennon of St. Louis sent Father Gerald Fick to investigate the possibility of establishing a new parish. The parish

property was acquired from Mr. and Mrs. Engelbert Franke in 1904 by Bishop Glennon and over the years, title to this property has descended to his successors in office, the current successor being respondent McAuliffe although from evidence at trial there appears to be a gap in title between Archbishop Glennon and Archbishop Ritter.

A small wooden church was originally constructed on the site but by 1919 the congregation apparently had outgrown the original wooden church and subscriptions were solicited by the pastor for a new church building. The ancestors of petitioners Struemph and others donated money and labor to build the church which was dedicated in 1921. For example, teams of parishioners would break rocks at the stone quarry and haul them to the construction site and children would haul the bricks.

Petitioner Joseph Struemph has lived on a farm about 4-1/2 miles west of Freeburg since his birth in 1907, after which he was baptized in the Freeburg Church where his parents were members.

The Struemph family attended all its religious and social activities. The elder Mr. Struemph was a member of the Board of Trustees, the governing body at that time, which made the decisions as to the use to be made of church property. He attended its schools and over the years grew to appreciate both the exterior and interior of the church which early earned the name "Cathedral of the Ozarks" and which virtually was the center of his and other parishioners' educational, social, and religious life.

The side altars, which constituted the principal subject of petitioners' suit, were not part of the church building when dedicated in 1921 but were donated by petitioner Joseph Struemph's father, among others, sometime prior to his death in 1940. These altars are to the left and

right of the main altar, the one to the left being called The Blessed Virgin Altar and the one to the right being called The St. Joseph Altar. Each was approximately 16 to 18 feet high including an arch-type top and attached tabernacle upon which sat a statue of its namesake.

The parish council, a body of thirteen persons plus the priest and a sister who are ex-officio members, purportedly is an outgrowth of suggestions made in 1963 by Vatican Council II designed to increase participation by the parishioners at the parish level in keeping with the mandated principle of collegiality or shared governance. A new parish council, with a new set of by-laws and constitution, was formed after Behan's appointment.

Shortly after Behan's appointment in 1975, petitioner Charles Struemph, a member of the parish council, first learned that changes were being considered to the altars in the Freeburg Church, among others in the diocese. He resigned from his position on the parish council when he was told it was advisory only in that its decisions could be vetoed by either the pastor or the bishop. From early 1976 to August of 1978 the proposed changes were the subject of discussions and meetings among the parishioners, parish council, Behan, McAuliffe and combinations thereof, which increased in intensity.

Whether there would in fact be any changes within the Freeburg Church interior and, if so, what those proposed changes would be had only been discussed in general terms until November of 1977 when the initial plan was presented calling for the removal of side altars in their entirety. This plan was proposed by Behan and was not formulated pursuant to any church-related documents or directions.

On or about February 20, 1978, the parish council voted 9 to 2 to make no changes in the church but if such

matters were to be considered again, a vote of the parishioners was to be taken. Immediately after the meeting Behan indicated he would "veto" that decision.

On March 20, 1978, Behan reaffirmed his veto and another vote was taken on several plans, including Behan's proposal which was again defeated 8 to 5. Behan also "vetoed" that decision.

The parish council next met on April 17, 1978, and again refused to approve Behan's proposal and so at the next May 15, 1978, meeting McAuliffe also was present, whereat he was presented with petitions signed by more than 200 parishioners "in favor of keeping the main altar and two side altars intact as they are without removing any portion of them and to leave the altar of sacrifice in front of the pews approximately where it is now." Nevertheless, McAuliffe decided to experiment with several different altar placements. No vote was taken by the council which concluded "as a result of the February, March and April meetings, the Council realized that there was no alternative but to recommend changes that would be 'acceptable' and this meant giving up all or part of the side altars." Several council members indicated the experimental arrangements were contrary to the wishes of the majority of the parishioners.

The dispute erupted on August 19, 1978, when a 2-1/2 ton truck with a crew of four or five men was dispatched by Coy Moving Company at Behan's request to remove the altars from the church. Behan and the movers were met by a group of six to eight parishioners who physically prevented the movers from effecting their assigned task. Law enforcement officials arrived, heated words were exchanged and the confrontation concluded with the movers departing and the altars remaining intact.

On August 28, 1978, petitioners filed suit in the Circuit Court of Osage County. That afternoon, the trial court issued its order temporarily restraining respondent from removing the main altar or either side altars.

On the evening of August 28, 1978, a special meeting of the parish council was held at Behan's request whereat the members voted 10 to 4 to reaffirm its discussion of May 8 that it had no alternative but to accept McAuliffe's decision; however, the council voted 13 to 0, with one abstention, that any altars or articles of value removed be properly stored and preserved on the church premises.

By agreement of the parties, the temporary restraining order was modified on September 7, 1978, to allow respondent to remove the tops of the side altars provided they remain safely stored and preserved on the premises until the matter is finally disposed of.

Respondent unsuccessfully sought to prohibit the trial court from entertaining jurisdiction and trial was subsequently held on December 12, 1980, in the Circuit Court of Osage County, Missouri.

As evidenced by documents identified at trial, the chain of title to the real property upon which the Freeburg Church is located is as follows:

A. On February 4, 1904, Engelbert Franke and Adelheid Franke, his wife, conveyed the realty by general warranty deed to "Most Rev. J. J. Glennon, Archbishop of St. Louis or his lawful successor." (No mention is made in the conveying document or in the evidence regarding the transfer of personality.)

B. On November 27, 1956, Joseph E. Ritter, Archbishop of St. Louis conveyed by special warranty deed "all of the property, real, personal and mixed, now owned by

or standing in the name of (Ritter) or his predecessors in title as archbishop or bishop," to Joseph M. Marling, Bishop of Jefferson City.

C. On August 18, 1969, Joseph M. Marling, Bishop of Jefferson City, conveyed by quit-claim deed his interest in any realty in Cole County to Michael F. McAuliffe, without further description thereof. (No mention is made in this document or in the evidence regarding the transfer of any personality.)

Neither the Roman Catholic Church, nor the Diocese of Jefferson City, nor the Holy Family Parish is a body corporate and, by church doctrine, the bishop is not the owner of any property, either real or personal, but administers the parish assets for the benefit of the parishioners.

UNCONSTITUTIONALITY RAISED

The unconstitutionality of the judgment of the Missouri Court of Appeals - Eastern District, as more fully explored above and below, was raised by petitioners at the earliest moment. See the subsequent motion for rehearing and transfer (Appendix B).

REASONS FOR GRANTING THE WRIT

Simply stated, this court should grant this petition for writ of certiorari because the opinion of the Missouri Court of Appeals bars Catholic parishioners from securing civil relief regardless of what a church official does with parish property. They have a right to go to court but the court can grant no relief regardless of the evidence of abuse of his powers of control over the property. And that makes neither logical, legal nor constitutional sense.

ARGUMENT

The opinion of the Missouri Court of Appeals - Eastern District, reversing the trial court and dissolving its permanent injunction relative to certain items of church personal property was premised on its reading of *Jones v. Wolf*, 443 U.S. 595 (1979) so as to permit state courts the freedom to either treat hierarchical churches as any other voluntary association or to accord them preferential treatment by deferring to the resolution reached by the chosen body of the hierarchy. Given the two alternatives, the state court then opted for the latter and declared that the absolute deference doctrine set forth in *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1872) was and is the law of the State of Missouri.

Petitioners concede that such a reading is understandable; but, on the other hand, it may, and has, been fairly argued that *Jones v. Wolf* is indeed a rejection of the absolute deference doctrine and an indication that henceforth religious groups would be treated on a plane with other voluntary associations. See, for e.g., *The Supreme Court*, 1968 term, 83 *Harv. L. Rev.* 7, 129, 133 (1969), which concludes: "Prompt clarification from the Court is essential to rectify the serious confusion created by its decision." Subsequent decisions by state courts have confirmed this need. See, e.g., the instant case and *Southside Tabernacle v. Pentecostal Church of God*, 650 P.2d 231 (Wash. 1982).

Unquestionably, *Jones* prohibits civil courts from considering the particular religious doctrines and practices in resolving church property disputes. *Id.* at 602. Hierarchical versus congregational no longer is a valid consideration. See, e.g., *Piletich v. Deretich*, 328 N.W.2d 696 (Minn. 1983).

It also has been suggested that in order to accommodate the seeming contradiction of the two religion clauses (free exercise and non-establishment) of the First Amendment, the "neutral principles of law" approach is not only permissible but is the *only* constitutionally acceptable mode for resolving church-property disputes. As analyzed by the Honorable Arlin M. Adams, Circuit Judge for the United States Court of Appeals for the 3rd Circuit:

"It has also been observed that the difficulties in resolving church quarrels stem from the more fundamental problem of reconciling the parallel protections of the free exercise and nonestablishment provisions of the first amendment. This is said to be so because 'each party to an intrachurch dispute can lay claim to the protections offered by one of the religious clauses.'

This Article suggests, to the contrary, that at least in the area of church disputes over property, the two religion clauses each work to the same end. Relying on the conception that 'the religion clauses were not separate mandates but a single one and that the underlying proposition was assurance of equality of treatment,' it proposes that 'neutral principles of law' constitute not merely a permissible but the constitutionally required mode for resolving church-property disputes. Although based on a belief that religious liberty will be furthered by a separation of a church and state, judicial deference to a hierarchical church's internal authority, when premised upon the assumption that members of a competing group voluntarily have submitted their property to the control of that authority, places the imprimatur of secular authority behind a particular form of religious organization—thereby implicating the establishment clause. At the same time, it also interferes with the freedom of in-

dividuals and groups to associate on their own terms for religious purposes." Adams and Hanlon, *Jones v. Wolf: Church Autonomy and the Religion Clauses of the First Amendment*, 128 U.Pa. 1291 (June 1980), citations within omitted.

In the instant case, the Missouri Court of Appeals not only has fallen into this trap of endorsing the Roman Catholic Church but also has used its doctrine as a basis for its decision. The court after describing the Catholic hierarchy, concludes that "The rule of deference is peculiarly applicable to and is indeed a part of the structure of the Roman Catholic Church. The plaintiffs have not demonstrated any reason that cannot or should not continue to be so applied. The rule of deference to the decisions of the clerical authorities of the Roman Catholic Church is yet the law in this state." As if that were not enough, the Court of Appeals then scrutinizes and interprets Catholic Church canons and declares that the trial court's findings in petitioners' favor was the result of its "misunderstanding" of those canons. *Jones v. Wolf, supra*, at 566. This, petitioners submit, is directly contrary to *Jones v. Wolf* and the First Amendment to the Federal Constitution.

Moreover, the absolute deference approach particularly is inapplicable in cases such as the instant one when the church property dispute is *not* between opposing factions but between the parishioners and the hierarchy. While the issue in the former is one of declaration of ownership, the latter involves not the allocation of the power to control the church assets but rather the manner in which that power is used. Although permeating both the pleadings and evidence and recognized by the trial court as a primary basis for its decision, this issue escaped the Missouri Court of Appeals' analysis entirely.

That court has yet to grasp that the deference doctrine arose from a theory of implied consent but there was and is no consent to arbitrary or fraudulent actions. See, for example, *Gonzalez v. Roman Catholic Archbishop*, 280 U.S. 1 (1929), which imposed a qualification on the deference principle by only making it applicable "in the absence of fraud, collusion or arbitrariness".

In the very first paragraph of its opinion, the Court of Appeals declares the issue to be "the extent of the authority of the Bishop over the church building and its contents and the fiscal affairs of the parish." Oddly, no mention is made of the other side of that coin, that is, whether the parishioners have *any* protectible legal interest in that same property.

That glaring omission was an omen of the ill to follow.

The opinion is replete with the term "right to control" the property and indeed the Court of Appeals places that right with the Bishop, who is declared to have legal title, but it cannot be ascertained as to whether legal title equates with absolute ownership or is something less than that.

Neither the ownership of assets nor the allocation of the power to control them within the church framework ever was an issue. Rather, petitioners claimed, and the trial court agreed, that while the Bishop may have the power to control the property he may not do so *arbitrarily*.

The Missouri court's reliance and purported "re-affirmation" of *Watson v. Jones, supra*, as the law of this state is most curious in that *Watson* received little post-publication attention.

Not in his wildest imagination could respondent envision that *Watson* retained even a breath of vitality today or most certainly he would have cited it once as authority

for his various points. This court in *Jones* at least gave it footnote recognition but dismissed any value because of assumptions therein. As Adams and Hanlon noted at page 1333, the implied consent principle in *Watson* was "merely *dictum* and, although sometimes cited, it has never been the subject of a Supreme Court holding. The doctrine of implied consent was not necessary to the court's decision in *Watson* because it was undisputed that the local church had submitted its property to the general church's control." (Emphasis added.) "Nevertheless," they lament, "a number of state courts have felt bound by *Watson's* prescription of implied consent, apparently out of a desire to avoid judicial intrusion into the affairs of religious associations."

Missouri has never been one of those courts. In fact, the rationale of *Watson v. Jones* was expressly rejected the very next year by the Missouri Supreme Court in *Watson v. Garvin*, 54 Mo. 353 (1873).

The judicial history in the resolution of church property disputes reflects a continual balancing of individual property rights versus religious freedom. The current law of this land, as viewed by this Court, is found not in the 1872 case of *Watson v. Jones* but in the 1979 case of *Jones v. Wolf*, espousing the neutral principles approach as a prevention to judicial result selection.

This Court must sense the parishioners' frustration when, on the one hand, the Missouri Court of Appeals recognizes its duty to resolve church property disputes and, on the other hand, declares that it must absolutely defer to the court official's actions regardless of their proven arbitrariness. The Missouri state court has thus given the parishioners the right to bat but the pitcher may strike them out by declaring second base to be homeplate and then pitching to the second baseman.

The effect of such a ridiculous concept is to deny parishioners the access to courts that other citizens, including respondent, enjoy. This denial of equal protection is noted by Judge Adams at 1336 and 1337:

"Indeed, refusal to adjudicate a dispute over property rights or contractual obligations simply because the litigants are religious organizations 'smacks of a denial of equal protection as well as a violation of first amendment rights.' When a local church claims to have surrendered neither its autonomy nor its right to use church property, yet alleges usurpation by the hierarchy, it must have recourse to an impartial body to resolve its claims. The presumption that, by entering into an association with the hierarchical organization, a local church thereby gives up to the hierarchy autonomous control over its property, in effect begs this central question. As a result, the rule of compulsory deference, in conjunction with implied consent, denies to local churches the same protection of law afforded to other voluntary associations.

Judicial adherence to *Watson's* prescription of implied consent has been grounded in a desire to further religious liberty through the separation of church and state. Constrained by the misleading metaphor of a 'wall of separation' in church-state relations, some civil courts, reluctant to participate in disputes involving churches, have in professed compliance with the dictates of the religion clauses avoided inquiry into the nature of the parties' actual agreement. But the issue of judicial intervention into church disputes is not one of defining separate spheres within which churches and states respectively should operate. Rather, it is to develop standards that will assure all religious groups the equality of treatment that the first amendment requires."

Can a parishioner truly expect equality of treatment from a state judicial system bound to follow the opinion of a court of appeals which disregards all of this court's rulings in this area of the law except an obsolete 1872 case and holds that a parishioner can indeed file a lawsuit but that civil court must put its stamp of approval on the very action complained of in that suit.

CONCLUSION

For the foregoing reasons, petitioners respectfully submit that the United States Supreme Court should grant this petition for writ of certiorari and reverse the holding herein mandating that state civil courts must defer to church officials in disputes with parishioners involving the use of parish property.

Respectfully submitted,

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APPENDIX

APPENDIX A

Charles STRUEMPFH, Joseph Struemph, Johanna Struemph,
Steve Hoffman, Marie Hilke and Martha Kemna,
Respondents,

v.

Bishop Michael McAULIFFE, Appellant.

No. 46061.

Missouri Court of Appeals,
Eastern District,
Division Five.

Sept. 6, 1983.

Motion For Rehearing and/or Transfer to
Supreme Court Denied

Oct. 26, 1983.

Application to Transfer Denied
Jan. 17, 1984.

Six members of Roman Catholic parish brought action against pastor of parish and bishop of the diocese, seeking a permanent injunction prohibiting removal of main and side altars and relocation of the altar of sacrifice. The Circuit Court, Osage County, John C. Brackmann, J., permanently enjoined the bishop from removing the main altar from its site in the sanctuary, and further directed the bishop to restore the side altars in their position in the sanctuary. Bishop and pastor appealed. The Court of Appeals, Almon H. Maus, Special Judge, held that trial

court erred in determining that deed to church property to the archbishop or his lawful successor created a trust giving parishioners control over church property, since scrutiny of documents in purely secular terms provided no basis for finding any control over the property to be vested in the parishioners, and scrutiny of canons offered in evidence clearly revealed that property was held subject to control of the church hierarchy.

Reversed.

1. Religious Societies (Key) 24

While civil courts have no authority to decide controversies over ecclesiastical matters, civil courts must resolve property disputes even though they involve church organizations; this is true even though such disputes may often stem from action of ecclesiastical authorities. U.S.C.A. Const. Amend. 1.

2. Religious Societies (Key) 14

Rule of deference to the decision of clerical authorities of the Roman Catholic Church is still the law in Missouri.

3. Religious Societies (Key) 25

In applying doctrine of neutral principles to church property, the court may consider not only deeds and statutes, but relevant church documents as outlined in the cases.

4. Religious Societies (Key) 18

Trial court erred in determining that a deed to Roman Catholic archbishop or his lawful successor created a trust in favor of parishioners, since scrutiny of documents in purely secular terms provided no basis for finding any control of parish property to be vested in parishioners, and scrutiny of canons offered in evidence clearly revealed

that property was held subject to control of the church hierarchy.

Louis Defeo, Jefferson City, for appellant.

Ronald R. McMillin, Jefferson City, for respondents.

ALMON H. MAUS, Special Judge.

The plaintiffs in this action are six members of the Holy Family Parish of the Roman Catholic Church of Freeburg, Missouri. This is a parish of the Diocese of Jefferson City. The defendants were the pastor of the parish and the Bishop of the Diocese. When the pastor was reassigned, he was dismissed as a party and the Bishop is now the only defendant. At issue is the extent of the authority of the Bishop over the church building and its contents and the fiscal affairs of the parish. A brief resume of the evidence will be sufficient to cast the background of the controversy.

Holy Family Parish was established in 1904. In 1904 the real property involved was conveyed to the Archbishop of St. Louis, or his lawful successor. It is conceded title now stands in the name of the defendant Bishop. By 1919 the initial church building had become inadequate. A new church was built by the efforts of the parishioners. Those efforts included not only the contribution of money, but physical labor in the construction. Adults and children alike participated. The ancestors of some of the plaintiffs so contributed. The result was a church of architectural distinction and great beauty. The new church was dedicated in 1921. It has become known as the Cathedral of the Ozarks. It has been a source of pleasure and pride to the parishioners, including the plaintiffs.

The main altar of the church is located, as customary, against the front wall of the church. It is most impressive.

It projects reverence and beauty even to the untrained eye. Sometime between 1921 and 1940, additional altars were constructed on the left and right of the main altar. One side altar was donated by the father of one of the plaintiffs.

The Second Vatican Council changed certain liturgical practices of the Roman Catholic Church. Mass was formerly celebrated at the main altar. For the last several years Mass has been celebrated only at an additional altar, the altar of sacrifice. The altar of sacrifice was located several feet in front of the main altar. In celebrating Mass at this altar the priest faces the congregation. The hierarchy of the Catholic Church determined that the furnishings of churches should be arranged to focus attention upon the altar of sacrifice. To this end, it is "highly recommended that side altars be removed so that they do not distract from the liturgical unity and centrality of the one altar of sacrifice." Guidelines for Building and Renovating Churches, p. 10. In many churches built before the Second Vatican Council not only side altars, but main altars have been removed.

As a result of the Second Vatican Council, the Holy Family Parish has a parish council. The council consists of thirteen persons elected by parish members, and ex-officio, the pastor and one of the sisters of the parish school. The general purpose is to increase parishioner's participation in the affairs of the parish and to serve as a consultative body to the parish priest. The constitution and by-laws of the council acknowledge its advisory status and the ultimate authority of the hierarchy. The by-laws expressly state the decisions of the council must be ratified by the pastor. There is provision for appeal within the hierarchy.

For some time before November, 1977, there had been general discussion of possible changes in the altars of the church. This included a presentation to the pa-

rishioners. Parishioners' opposition to change developed. In a November, 1977 meeting, the pastor presented a proposed plan to the council. At that meeting and at a subsequent meeting, a majority of the council voted against that and other plans. The initial vote included a proposition that if there were further proposed changes, a vote of the parishioners should be taken. The pastor vetoed these resolutions of the council. A subsequent council meeting was attended by the Bishop. Petitions bearing the signatures of approximately 200 parishioners were presented at that meeting. The petitions were directed to the parish council, urging them to vote in favor of preserving the main altar and side altars and location of the altar of sacrifice. The petitions were received by the Bishop.

Amended proposals of change were presented at this meeting. The council expressed itself as having no alternative but to accede to the proposals of the pastor and Bishop. Under these proposals, the main altar was to remain intact. However, the council made five recommendations which included removing only the reredos of the side altars and storing them. The pastor approved the recommendations with the exception of those dealing with the relocation of the altar of sacrifice and front pews. After discussion, the Bishop determined, as reflected in the council's minutes, that issue should be settled in the following manner: "Experiment with both arrangements of the altar and pews for a period of 60 days on each arrangement. At the end of both experiments conduct a 'survey' or 'straw vote' of the parishioners to see which floor arrangement they would prefer. The council would then make the final decision, guided by the findings of the survey."

On August 19, 1978, a truck and crew arrived at the church. The pastor accompanied the crew. The trial court

found their purpose was to remove the altars. However, there is no direct evidence of that purpose before this court. One of the plaintiffs testified: "Some of the parishioners actually stood before the altar or would not let the movers in to remove that particular portion that they were supposed to move." This could have had reference to the relocation of the altar of sacrifice. Unfortunately, neither the pastor nor Bishop was asked about the movers' purpose. The cryptic quoted testimony was not further clarified. Nonetheless, the path of the pastor and the crew was blocked by six or eight parishioners. Those present included at least one of the plaintiffs. Tempers flared and heated words were exchanged. To a police officer who arrived at the scene, violence seemed imminent. The pastor and the crew withdrew.

The plaintiffs' petition is in three counts. Count I seeks an injunction prohibiting the removal of the main and side altars and relocation of the altar of sacrifice. Count II asserted that "[a]s a result of defendants' conduct, plaintiff and other members of the Parish Church would be deprived of their right to conduct the business and government of said church" and prayed for an accounting and general relief. Count III seeks a judgment declaring the plaintiffs, through the Holy Family Parish Council, are entitled to a periodic accounting and are entitled to control physical changes in the building and its contents.

Count I was severed and a separate trial held thereon. Rule 66.02. The trial court made findings of fact in general within the perimeter of the above resume. However, those findings pointedly omit reference to the recommendations of the parish council and their acceptance by the pastor and Bishop, as outlined above. Those findings do include the statement the purpose of the truck and crew was "to remove the altars from the church." As reviewed above,

there is no evidence to support the finding of the court concerning the purpose of the movers.

The trial court's conclusions of law include the following. The First Amendment to the Constitution of the United States does not require a state to accord "automatic deference to religious authority in resolving church property disputes." That "[a]s a means of adjudicating a church property dispute, a state court is constitutionally mandated to adopt a 'neutral principles of law' analysis" The initial deed to the Arch~~ishop~~ or his lawful successor created a trust. "Using the canonical terms the 'moral person' at the parish level is the cestui que [sic]." Further, taking the petition referred to "as indicative of the will of the cestui que, it appears that the cestui que desire the side altars with reredos intact."

The judgment permanently enjoined the Bishop from "removing the main altar from its site in the sanctuary" It further directed the defendants to restore the side altars, with reredos, to their position in the sanctuary. This judgment was made final for purposes of appeal.

This case presents for resolution litigation arising within a church organization. To bring the precise issue into focus and for proper consideration of the authorities, it is well to observe some factual variations presented by and general principles applicable to litigation involving church organizations. Such litigation may involve a general church organization or a local church. The church may be hierarchical or congregational. If hierarchical, it may have the presbyterian or the episcopal form of government. It may involve the schism of a local church from a general church organization. It may present a schism within a local church. Or, it may, as in this case, involve the right of control within a church organization.

[1] The First Amendment in part provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" From this has been derived the constitutional mandate that civil courts have no authority to decide controversies over ecclesiastical matters. *Murr v. Maxwell*, 232 S.W.2d 219 (Mo.App.1950); *Longmeyer v. Payne*, 205 S.W.2d 263 (Mo.App.1947); *Hynes v. Lillis*, 183 Mo.App. 190, 170 S.W. 396 (1914). However, it is generally acknowledged that civil courts must resolve property disputes even though they involve church organizations. *Fulbright v. Higginbotham*, 133 Mo. 668, 34 S.W. 875 (1896). This is true even though such disputes may often stem from the action of ecclesiastical authorities. *Williams v. Wilder*, 397 S.W.2d 696 (Mo.App.1965). The constitutional boundary restraining the authority of the civil courts is difficult of demarcation. In *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94, 115, 73 S.Ct. 143, 154, 97 L.Ed. 120, 136 (1952), the court said, "the right to use St. Nicholas Cathedral is strictly a matter of ecclesiastical government, . . . to appoint the ruling hierarch of the archdiocese of North America." This statement prompted the following observation. "Perhaps the conclusion implicitly recognized that the distinction between religious and property rights is sometimes illusory and merely a pragmatic way to resolve aspects of a dispute that affect the orderliness of society." Sirico, Jr., The Constitutional Dimensions of Church Property Disputes, 50 Wash.U.L.Q. 1, 28 (1981).

This case also demonstrates the obscurity of that boundary. The plaintiffs contend the existence and location of the altars is a property right. The defendant asserts the altars are an essential part of worship and the controversy is purely ecclesiastical. Without actually deciding the same to be true, the court will consider the case as if it involves a property right.

The first step in the demarcation of that constitutional boundary was *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 20 L.Ed. 666 (1872). While that case was not decided on a constitutional basis, the principles it enunciated have subsequently been declared to be so founded. *Kedroff v. Saint Nicholas Cathedral*, *supra*; *Presbyterian Church v. Hull Church*, 393 U.S. 440, 89 S.Ct. 601, 21 L.Ed.2d 658 (1969). *Watson v. Jones*, *supra*, involved a schism within a local Presbyterian church. The court recognized three factual circumstances encountered in determining the right to control property devoted to religious purposes. The first involves property held under an express trust.

The second is when the property is held by a religious congregation which, by the nature of its organization, is strictly independent of other ecclesiastical associations, and so far as church government is concerned, owes no fealty or obligation to any higher authority. The third is where the religious congregation or ecclesiastical body holding the property is but a subordinate member of some general church organization in which there are superior ecclesiastical tribunals with a general and ultimate power of control more or less complete in some supreme judicatory over the whole membership of that general organization. *Watson v. Jones*, *supra*, 80 U.S. (13 Wall.) at 722, 20 L.Ed. at 674.

The ordinary principles governing voluntary associations were declared applicable to churches belonging to class two. In regard to churches within class three the court said:

The right to organize voluntary religious associations to assist in the express decision of controverted questions of faith within the association and for the ec-

clesiastical government of all the individual members, congregations and officers within the general association is unquestioned. *All who united themselves to such a body do so with an implied consent to this government, and are bound to submit to it.* But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed (emphasis added). *Watson v. Jones*, *supra*, 80 U.S. at 726-729, 20 L.Ed. at 676-677.

The court then found the Presbyterian church to have the hierarchical form of government categorized in class three. The decision of the General Assembly concerning the faction entitled to the property was held to be conclusive.

The guidelines for the determination of such property rights were developed in Missouri at an early date based upon the classifications in *Watson v. Jones*, *supra*.

One joining an organized society such as a church having a representative form of government under the supervisions and control of judicatories known as church courts agrees by the act of membership to abide by the rules, orders and judgments of such courts properly made, and consents that whatever rights and privileges he may possess as a member shall be controlled by such rules, orders, and judgments. . . .

In view of the relation above defined which the individual bears to the church, it follows that the powers granted to the General Assembly and presbyteries, when exercised by them, are binding upon all of the members, regardless of whether the action

meets with their approval or not. The alternative of those who disapprove is simply withdrawal from the organization, for the fact of membership implies an agreement to abide by the actions of the governing body. *Hayes v. Manning*, *supra*, 263 Mo. 1, 33-34, 172 S.W. 897, 902-903 (banc 1914).

In *Klix v. Polish Roman Catholic St. Stanislaus Parish*, 137 Mo.App. 347, 118 S.W. 1171 (1909), the court clearly held that in the Roman Catholic Church control is vested in the hierarchy. The hierarchical structure of the Roman Catholic Church has also been recognized in *Olear v. Haniak*, 235 Mo.App. 249, 131 S.W.2d 375 (1939); *Hynes v. Lillis*, *supra*.

On the other hand, if a church is congregational in organization, within the second class categorized in *Watson v. Jones*, *supra*, it has been consistently held that control is vested in a majority of its members. *Fulbright v. Higginbotham*, *supra*; *Russie v. Brazzell*, 128 Mo. 93, 30 S.W. 526 (1895); *Prickett v. Wells*, 117 Mo. 502, 24 S.W. 52 (1893); *Clevenger v. McAfee*, 237 Mo.App. 1077, 170 S.W.2d 424 (1943). However, numerous cases restricted that control in the event of schism and a substantial departure from an established doctrine. In such instances, it was said to be the duty of the court to "award the property to the parties, whether in the majority or the minority, who have adhered to the doctrine and faith which existed prior to the schism or diversion." *Boyles v. Roberts*, 222 Mo. 613, 654, 121 S.W. 805, 813 (banc 1909). Also see *Lewis v. Wolfe*, 413 S.W.2d 314 (Mo.App.1967); *Mills v. Yount*, 393 S.W.2d 96 (Mo.App.1965); *Montgomery v. Snyder*, 320 S.W.2d 283 (Mo.App.1958); *Mertz v. Schaeffer*, 271 S.W.2d 238 (Mo.App.1954); *Trett v. Lambeth*, 195 S.W.2d 524 (Mo.App.1946). But see *Hayes v. Manning*, *supra*; *Turpin v. Bagby*, 138 Mo. 7, 39 S.W. 455

(1887). The courts have determined the regularity of the procedure employed in the exercise of control by a majority. *Fast v. Smyth*, 527 S.W.2d 673 (Mo.App.1975); *Trett v. Lambeth*, *supra*; *Briscoe v. Williams*, 192 S.W.2d 643 (Mo.App.1946); *Stone v. Bogue*, 181 S.W.2d 187 (Mo. App.1944).

Following *Watson v. Jones*, *supra*, federal constitutional limitations upon the authority of the states to establish standards for the determination of the right to control the use of property devoted to religious purposes have been the subject of a series of decisions of the Supreme Court of the United States. A review of all those decisions is not necessary for the determination of this case. Excellent reviews are found in Adams and Hanlon, *Jones v. Wolf: Church Autonomy and the Religion Clauses of the First Amendment*, 128 U.Pa. 1291 (1980); Sirico, Jr., *The Constitutional Dimensions of Church Property Disputes*, *supra*, 50 Wash.U.L.Q. 1. However, for a better understanding of *Jones v. Wolf*, 443 U.S. 595, 99 S.Ct. 3020, 61 L.Ed.2d 775 (1979), the prior decision of *Presbyterian Church v. Hull Church*, *supra*, should be noted.

In that case the general church involved was a hierarchical organization of churches with the presbyterian type of government. Because of doctrinal differences, the congregation of two local churches voted for secession. Litigation contesting the right to control the property of those two churches "was submitted to the jury on the theory that Georgia law implies a trust of local church property for the benefit of the general church on the sole condition that the general church adhere to its tenets of faith and practice existing at the time of affiliation by the local churches." *Presbyterian Church v. Hull Church*, *supra*, 393 U.S. at 443, 89 S.Ct. at 603, 21 L.Ed.2d at 662.

Upon a jury's determination the actions of the general church constituted a substantial abandonment of those tenets, the implied trust was terminated. The general church was enjoined from interfering with the use of the property. In approving and after quoting a portion of *Watson v. Jones*, *supra*, the court declared "[t]he logic of this language leaves the civil courts no role in determining ecclesiastical questions in the process of resolving property disputes." *Presbyterian Church v. Hull Church*, *supra*, 393 U.S. at 447, 89 S.Ct. at 605, 21 L.Ed.2d at 664. "[T]he departure-from-doctrine element of the Georgia implied trust theory requires the civil court to determine matters at the very core of a religion—the interpretation of particular church doctrines and the importance of those doctrines to the religion. Plainly, the First Amendment forbids civil courts from playing such a role." *Presbyterian Church v. Hull Church*, *supra*, 393 U.S. at 450, 89 S.Ct. at 607, 21 L.Ed.2d at 666. The annulment of the authority of the general church on the basis of a departure from doctrine was held to be an impermissible intrusion into ecclesiastical affairs. In so holding the court observed "[a]nd there are neutral principles of law, developed for use in all property disputes, which can be applied without 'establishing' churches to which property is awarded." *Presbyterian Church v. Hull Church*, *supra*, 393 U.S. at 449, 89 S.Ct. at 606, 21 L.Ed.2d at 665.

In the most recent case, *Jones v. Wolf*, *supra*, a majority of the members of a local church affiliated with the Presbyterian Church in the United States voted to affiliate with another denomination. The General Assembly, through an Administrative Commission, determined the minority followed the true faith and were entitled to the use of the property held in the name of trustees for the local church. The Georgia Supreme Court determined

the issue by the application of neutral principles of law. That court considered the deeds to the property, state statutes dealing with implied trusts and the Book of Church Order and determined there was no basis for a trust in favor of the general church. The use of the property was awarded upon the basis of the legal title to the property.

The minority contended that the courts of Georgia were required to defer to the decision of the General Assembly. Without analyzing the hierarchical structure of the general church, and referring only to *Watson v. Jones*, *supra*, in a footnote, the majority opinion held Georgia was "constitutionally entitled to adopt neutral principles of law as a means of adjudicating a church property dispute." *Jones v. Wolf*, *supra*, 443 U.S. at 604, 99 S.Ct. at 3026, 61 L.Ed.2d at 785. In responding to the adherence of the dissent to *Watson v. Jones*, the majority opinion states:

Under the neutral-principles approach, the outcome of a church property dispute is not foreordained. At any time before the dispute erupts, the parties can ensure, if they so desire, that the faction loyal to the hierarchical church will retain the church property. They can modify deeds or the corporate charter to include a right of reversion or trust in favor of the general church. Alternatively, the constitution of the general church can be made to recite an express trust in favor of the denominational church. *Jones v. Wolf*, *supra*, 443 U.S. at 606, 99 S.Ct. at 3027, 61 L.Ed.2d at 786.

The first statement seems to imply that if a neutral-principles approach is adopted, ultimate control of property titled in a local church can be vested in a hierarchy

by documents employing language of express trusts or reversions. The meaning of the alternative statement is not clear. It may have reference to a trust conditioned upon adherence to a denomination, in the sense of a doctrine of belief. The case was remanded for a determination if, under neutral principles, the law of Georgia provides that the identity of the local church is to be determined in accordance with the laws and regulations of the general church.

As noted, the trial court, apparently so interpreting *Jones v. Wolf*, *supra*, declared "[a]s a means of adjudicating a church property dispute, a state court is constitutionally mandated to adopt a 'neutral principles of law' analysis" This was error. In that decision the United States Supreme Court did not decide that the right to control the use of property titled in a Bishop of the Roman Catholic Church must be determined upon the neutral principles therein referred to. "Subject to these limitations, however, the First Amendment does not dictate that a State must follow a particular method of resolving church property disputes." *Jones v. Wolf*, *supra*, 443 U.S. at 602, 99 S.Ct. at 3025, 61 L.Ed.2d at 784. A state may yet observe the rule of deference applicable to a hierarchical church as enunciated in *Watson v. Jones*, *supra*; *Presbytery of Baltimore v. Babcock Memorial*, 52 Md.App. 428, 449 A.2d 1190 (1982); *Bennison v. Sharp*, 121 Mich.App. 705, 329 N.W.2d 466 (1983); *Tea v. Protestant Episcopal Church, Etc.*, 96 Nev. 399, 610 P.2d 182 (1980); *Southside Tabernacle v. Pentecostal, Etc.*, 32 Wash.App. 814, 650 P.2d 231 (1982). There is a distinction between establishing a religion and taking cognizance of the fundamental discipline of a church as established by its founders. To fail to respect that discipline could lead to the diversion of assets dedicated over the cen-

turies to cherished beliefs. See *Skelton v. Word Chapel, Inc.*, 130 Ariz. 543, 637 P.2d 753 (Ariz.App.1981).

[2] The rule of deference to the decisions of the ecclesiastical authorities of a hierarchical church is well established in Missouri. The evidence in this case "proves there is a graded hierarchy in the Catholic Church, extending from the priests of parishes through bishops and archbishops to the Roman See; and, as said, the higher clericals, and not the congregation, hold title to and manage temporalities." *Klix v. Polish Roman Catholic St. Stanislaus Parish*, *supra*, 137 Mo.App. 347, 363-364, 118 S.W. 1171, 1176 (1909). The observations of this court in 1909 are equally valid today.

Many religious sects, and among them the Roman Catholic, are of world-wide extent and vast membership, with congregations, parishes and established hierarchies and councils in every land. For ages they have observed a uniform polity, not only in spiritual matters, but in the transaction of secular business and the management of their properties. To force upon them an unaccustomed economy would introduce confusion and embarrassment; whereas to refuse them corporate capacity, except on the condition of renouncing their customs, would be illiberal treatment by the state. The record indicates that in the Roman Catholic communion, the titles to church possessions are vested in the bishops and archbishops, who manage them, either directly or through the parish priests, and without participation by the congregation. A statutory alteration of the form of church government may not constitute interference with matters of faith, yet, nevertheless, the right of every religious sect to preserve the peculiar economy it prefers, and perhaps has obeyed immemorially, touches closely, if it is not part of it, that religious freedom which American Constitutions

guarantee. *Klix v. Polish Roman Catholic St. Stanislaus Parish*, *supra*, 137 Mo.App. at 362, 118 S.W. at 1176.

The rule of deference is peculiarly applicable to and is indeed a part of the structure of the Roman Catholic Church. The plaintiffs have not demonstrated any reason it cannot or should not continue to be so applied. The rule of deference to the decisions of the clerical authorities of the Roman Catholic Church is yet the law in this state. Also see *Parent v. Roman Catholic Bishop of Portland*, 436 A.2d 888 (Me.1981); *Benison v. Sharp*, *supra*; *Tea v. Protestant Episcopal Church, Etc.*, *supra*.

However, it is appropriate to consider the possible application of the doctrine of neutral principles to this case. As developed in *Jones v. Wolf*, *supra*, that doctrine is couched in terms of express trusts and reversions. It appears difficult of application when there is no actual schism within the church. When the question is the right of control of property as distinguished from the vesting of title, the issue is resolved by a determination the hierarchical structure of the church extends to the control of property. "On close examination no meaningful distinction can be drawn between the process of determining whether the parties meant to create a trust in favor of the general church and that of deciding in whom the parties intended to place ultimate authority over the church property." Adams and Hanlon, *Jones v. Wolf: Church Autonomy and The Religion Clauses of the First Amendment*, *supra*, 128 U.Pa. at 1323.

[3, 4] Nonetheless, considering the status of the title to the property in question under neutral principles as so developed, the trial court erred. That method is said to rely "exclusively on objective, well-established concepts of trust and property law familiar to lawyers and judges. . . . [A] civil court must take special care to scruti-

nize the document in purely secular terms, and not to rely on religious precepts in determining whether the document indicates that the parties have intended to create a trust." *Jones v. Wolf*, *supra*, 443 U.S. at 603-604, 99 S.Ct. at 3025-3026, 61 L.Ed.2d at 785. In applying that doctrine, a court may consider not only the deeds and statutes, but relevant church documents as outlined in the cases. *Jones v. Wolf*, *supra*; *New York Annual Conference, Etc. v. Fisher*, 182 Conn. 272, 438 A.2d 62 (1980); *Presbytery of Baltimore v. Babcock Memorial*, *supra*; *Southside Tabernacle v. Pentecostal, Etc.*, *supra*. Title to the property in question is vested in the Bishop. An expert in canon and civil law testified the canons of the church control the use of property standing in the name of the Bishop. Canon 1499 # 2 does provide: "Under supreme authority of the Apostolic See, the ownership of property belongs to that moral person which has legitimately acquired it." As stated, the trial court found the "moral person" was the parish and concluded the parishioners could exercise some control over the property in the name of the Bishop. It is beyond the scope of this opinion to attempt a statement of the full meaning of "moral person" as that term is used in the Roman Catholic faith. The finding of the trial court is a misunderstanding of that meaning. It is sufficient to say that scrutiny of the documents in purely secular terms provides no basis for finding any control of that property to be vested in the parishioners. Such scrutiny of the canons offered in evidence clearly reveals that the property is held subject to the control of the hierarchy of the church.

The judgment of the trial court on Count I is reversed and that count is dismissed. What has been said in this opinion should control the disposition of the remaining two counts.

DOWD, C.J., and ROBERT L. CAMPBELL, Special Judge, concur.

APPENDIX B

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT
DIVISION V

No. 46061

CHARLES STRUEMPH, JOSEPH STRUEMPH,
JOHANNA STRUEMPH, STEVE HOFFMAN,
MARIE HILKE and MARTHA KEMNA,

Respondents,

vs.

BISHOP MICHAEL McAULIFFE,
Appellant.

**RESPONDENTS' MOTION FOR REHEARING AND
APPLICATION TO TRANSFER TO THE
SUPREME COURT OF MISSOURI**

Respondents Charles Struemph, Joseph Struemph, Johanna Struemph, Steve Hoffman, Marie Hilke and Martha Kemna, pursuant to Supreme Court Rules 84.17 and 83.02, move the Court for a rehearing or, alternatively, to transfer to the Supreme Court of Missouri and as grounds therefor state that:

I. Pursuant to Missouri Supreme Court Rule 84.17, respondents call attention to the following material matters of law and fact overlooked or misinterpreted by the court as shown by its opinion:

A. This Court totally ignored, and therefore failed to restrict its inquiry to, the scope of review of trial court decisions established by the Missouri Supreme Court in the case of *Murphy v. Carron*, 536 S.W.2d 30 (Mo. banc 1976) and subsequently embodied in Missouri Supreme Court Rule 73.01.

B. This Court fails to recognize and therefore fails to address the real issue, to wit: The allocation of the power to control church assets versus the manner in which that power is used.

C. In the issues it does address, this Court relies upon church doctrine and canons in the analysis and resolution thereof, in violation of the guidelines set by the United States Supreme Court in *Jones v. Wolf*, 443 U.S. 595 (1979).

D. This Court endorses the Roman Catholic religion as a favored structure for the application of a legal doctrine known as the "rule of deference," in violation of the church-state separation clauses of the federal and state constitutions.

E. This Court's adoption of the long-abandoned "rule of deference" based on the theory of "implied consent" to resolve a church property dispute violates the equal protection clauses of the federal and state constitutions in that it deprives Roman Catholic parishioners, and particularly respondents, of the same access to courts afforded other citizens, including appellants.

F. This Court misinterprets and misapplies *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1872), a 111-year-old case neither cited by nor relied upon by either party.

II. Pursuant to Missouri Supreme Court Rule 83.02, respondents urge transfer to the Missouri Supreme Court

because of the general interest or importance of the question involved in the case or, alternatively, for the purpose of reexamining the existing law, in that:

A. The instant case, and the facts and circumstances giving rise thereto, has received considerable national attention from its inception and resolution of the core issue may impact members of the Roman Catholic churches not only in Missouri but in all states.

B. Alternatively and hypothetically, if *Watson v. Jones, supra*, is indeed the law in the state of Missouri (which respondents vehemently deny), then it should be reexamined in light of societal changes and subsequent case law during the past 111 years, for the reasons set forth in Part I above.

Suggestions in support hereof are attached.

Carson, Monaco, Coil, Riley
and McMillin, P.C.

By /s/ Ronald R. McMillin

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APPENDIX C

NO. 65519

IN THE SUPREME COURT OF MISSOURI
ED #46061

September Session 1983

Charles Struemph, Joseph Struemph, Johanna Struemph,
Steve Hoffman, Marie Hilke and Martha Kemna,
Respondents,
vs. TRANSFER
Bishop Michael McAuliffe,
Appellant.

Now at this day, on consideration of respondents' Application to transfer the above entitled cause from the Eastern District Court of Appeals, it is ordered that said application be, and the same is hereby denied.

STATE OF MISSOURI—SCT.

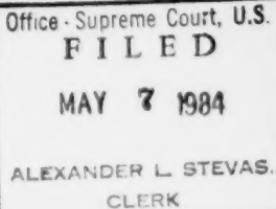
I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the September Session thereof, 1983, and on the 17th day of January 1984, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson City, this 17th day of January 1984.

/s/ (Illegible)

Clerk

..... D. C.



No. 83-1645

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1983

CHARLES STRUEMPH, JOSEPH STRUEMPH,
JOHANNA STRUEMPH, STEVE HOFFMAN,
MARIE HILKE and MARTHA KEMNA,
Petitioners,
vs.
BISHOP MICHAEL McAULIFFE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF MISSOURI

RESPONDENT'S BRIEF IN OPPOSITION

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NO. 83-1645
IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 1983

CHARLES STRUEMPH, JOSEPH STRUEMPH,
JOHANNA STRUEMPH, STEVE HOFFMAN,
MARIE HILKE and MARTHA KEMNA,
Petitioners,
vs.
BISHOP MICHAEL McAULIFFE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF MISSOURI

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Forenote: Respondent does not find the Petitioners' Statement of the Case to be satisfactory and, therefore, sets out his own presentation. Respondent's Statement and Argument include specific references to the record before the state court of appeals for the convenience of this Court should it request that the record below be transmitted pursuant to Rule 19.1.

The Parties:

Respondent Michael F. McAuliffe is the Bishop of the Catholic Diocese of Jefferson City by appointment of the Pope (Tr. 151; Dfs. Exh. M, Letter of Appointment of Bishop by Pope).

Reverend Hugh Behan, a defendant in the trial court, was pastor of Holy Family Parish from November 5, 1975, including the years 1977, 1978 and 1979 during which these issues arose, by appointment of Bishop McAuliffe. Later he was appointed pastor of another parish in the Diocese (Tr. 39-40 and 49) and subsequently dismissed as to Count I of the Petition.

Petitioners (Plaintiffs before the trial court) are members of the Catholic Church by Baptism and members of Holy Family Parish, Freeburg, Missouri, by reason of their residing in the geographic area of that parish although those who testified had ceased attending the parish before the dispute over the side altars. (Dfs. Exh. C., Canons 87 and 91; Tr. 40, 63 and 144).

The Parish and Church:

Holy Family Parish, Freeburg, Missouri is a parish of the Catholic Diocese of Jefferson City, having been established by the Archbishop of St. Louis in 1904 and assigned in 1956 to the new Diocese of Jefferson City when the Diocese was established by the Pope from parts of the St. Louis Archdiocese and other dioceses (Tr. 11, 154; Plfs. Exh. 17, p. 12, "Souvenir of . . . Silver Jubilee;" Dfs. Exh. L, papal bull establishing dioceses).

During the late 1800's Catholics in the Freeburg area were ministered to by Jesuit missionaries who were supported by Catholics in Europe (Plfs. Exh. 17, p. 10; Tr. 15-17). In 1903 Archbishop Glennon of St. Louis sent Father Gerald Fick to investigate the possibility of establishing a new parish (Tr. 11; Plfs. Exh. 17, p 12).

The parish property was acquired from Mr. and Mrs. Engelbert Franke in 1904 by Archbishop Glennon and over the years title has descended to his successors in office, the current successor being Bishop McAuliffe (Tr. 157, 165, et seq.; Dfs. Exh. H, I and J, deeds).

Originally there was a small wooden church (Plfs. Exh. 17, p. 12). By 1919 apparently the congregation had outgrown the original wooden church and the pastor, Father Fick, began the drive for a new church (Tr. 11; Plfs. Exh. 17, p 12 and p. 20). Through the "free will offerings" of money and labor by the pastor and parishioners (Plfs. Exh. 17, p. 39) including Petitioner Struemph's ancestors (Tr. 66), the new church was built and was dedicated by Archbishop Glennon in 1921 (Plfs. Exh. 17, p. 23).

In the Sanctuary of Holy Family Catholic Church there are four altars: (1) The Altar of Sacrifice; (2) the old "high" or "main" altar; (3) the Blessed Virgin Mary side altar (left side); and (4) the St. Joseph side altar (right side) (Plfs. Exh. 5, Photo; Tr. 31-33).

The "Altar of Sacrifice" is a free standing altar located in the center of the Sanctuary proximate to the congregation and arranged so that the priest and congregation face each other across the altar table (Tr. 54-55; Dfs. Exh. G, "General Instructions of the Roman Missal", p. 41, paragraph 262; Dfs. Exh. K, "Guidelines for Building or Renovating Churchs," p. 5, paragraph 27).

The altar referred to as the old "high" or "main" altar is located against the front wall of the interior in the center (Plfs. Exh. 17, p. 37). A priest saying Mass at this altar would have his back to the congregation (Tr. 161). This altar in the past was the principal altar for the celebration of the Mass and thus was called the main altar. For over a decade the Mass has been celebrated at a different altar (the Altar of Sacrifice) located in the center of the Sanctuary with the priest facing the people.

The side altar referred to as the "Blessed Virgin Mary altar" is located against the wall in the front interior and to the congregation's left (Tr. 32).

The side altar referred to as the "St. Joseph altar" is located against the front interior wall to the congregation's right (Tr. 32).

Prior to the filing of this suit, on each of the tables of these side altars were reredos, ornamental, arched tops against the wall with places for statuary etc. (Tr. 31-32). Petitioners

were unable to testify as to when the reredos were installed (Tr. 74-76).

The Dispute:

The Second Vatican Council (1963-1965) changed the liturgical practices of the Catholic Church. The hierarchy of the Church made the liturgical decision to arrange churches so as to focus attention on the one Altar of Sacrifice and remove or modify things which distract the full attention and participation of the people on the central celebration of the Mass (Dfs. Exh. E, "Instruction on Eucharistic Worship", p. 38, paragraph 72; Dfs. Exh. K, p. 5, paragraph 6 and p. 10, paragraph 57).

Since Vatican II Mass is celebrated only at the Altar of Sacrifice. It is in fact the current main or high altar. In churches constructed since Vatican II there is only this one altar in the Sanctuary. In many churches built before Vatican II the former "main" altar and side altars have been removed (Tr. 20-21). The new Altar of Sacrifice is the center of worship (Dfs. Exh. F, p. 38, paragraph 72; Dfs. Exh. K, p. 1, paragraphs 3 and 4). It is "highly recommended that side altars be removed so that they do not distract from the liturgical unity and centrality of the one Altar of Sacrifice" (Dfs. Exh. K, p. 10, paragraph 57; also see p. 5, paragraph 26 and Dfs. Exh. F, p. 38, paragraph 72).

These changes by the hierarchy were based on the intention to preserve not

only "what our immediate ancestors passed on to us" but also "the entire past of the Church and all its customs" (Dfs. Exh. G, p. 18, paragraph 9).

Implementing the aforementioned liturgical decisions of the hierarchy, the Respondent Bishop and Pastor during 1978 removed the reredos (top part) but not the altar tables (bottom part) of the side altars in Holy Family Church. They also relocated the Altar of Sacrifice moving it closer to the congregation (Tr. 30, 32 and 69; Plfs. Exh. 34 and 35). Plans also included the rearranging of the Tabernacle (a secure cabinet or safe in which the Holy Eucharist or communion bread is kept), religious statues and other articles relating to the worship services.

Prior to implementing these changes the Respondent and pastor informed the parishioners including the Petitioners and consulted with the Parish Council (an advisory body)* on several occa-

* Petitioners state in their Petition at page 4 that "the elder Mr. Struemph was a member of the Board of Trustees, the governing body at that time...." The parish Board of Trustees which existed in the past was always advisory and never had governing authority. (Tr. 112-113). Moreover such bodies were expressly prohibited by Canon Law from interfering in the arrangement of altars. (Tr. 113. Dfs. Exh. C, Canon 1184). The Canon Law has been in effect since 1918 (Tr. 111) and precedes even the construction of the Freeburg Church in 1921.

sions.

On February 20, 1978, the Parish Council recommended, "No changing of the Church" without a vote of the parish (Plf. Exh. 11, p. 2). At the next meeting of the Parish Council the pastor vetoed this decision (Plf. Exh. 13). Other discussions occurred during the regular monthly meetings. On May 15, 1978, the Parish Council met. Bishop McAuliffe attended the meeting and at the beginning of the meeting was presented with petitions (Plf. Exh. 10) addressed to the Parish Council requesting that the altars be left intact (Plf. Exh. 16, p. 1). At the May meeting the Council made the following recommendations:

- "1. Use the tabernacle from the high altar and move it to the table of one of the now existing side altars.
- "2. Remove the tops only from the side altars and have them properly stored -- not discarded. This would be done because putting the Blessed Sacrament on a now existing side altar with statues on the top was 'not acceptable' as pointed out to the Council at the April meeting by Father Behan.
- "3. Use the table of the remaining side altar for Holy Family shrine.
- "4. Move the Altar of Sacrifice forward to the bottom step

of the Sanctuary, build a platform (from the bottom step to the second step) the length of the base of the Altar in order to let the rest of the bottom step free on either side of the Altar.

"5. Leave the benches facing the front. None to be removed in front. Large benches removed from the back of the Church to make room for larger vestibule could be cut to size and set at an angle in the area where the small benches are at present. Move small benches as needed in the choir loft."
(Plf. Exh. 16, p. 2)

All of the Council's recommendations were approved by the Pastor with the exception of numbers 4 and 5. It was agreed that they would experiment with the two alternative proposals for the arrangement of the Altar of Sacrifice and the pews (Plf. Exh. 16, p. 3). At a special meeting on August 28, 1978, the Council reaffirmed the compromise proposal approved at the May 15 meeting stating, "The compromise includes very moderate changes in comparison with the originally proposed changes, and so there has been compromise or 'giving in' on both sides." (Dfs. Exh. B)

However, the ultimate decision to make the changes was by Bishop McAuliffe (Tr. 43 to 47; Plfs. Exh. 11, 13, 15 and 16; Tr. 34).

Petitioners oppose the changes in the Sanctuary of the Church and initiated this lawsuit (Tr. 70).

The Proceedings:

On August 28, 1978, Petitioners filed a three count Petition in the Circuit Court (1) seeking temporary and permanent injunctions restraining the Bishop and Pastor from removing the main altar and two side altars and from moving the Altar of Sacrifice located in Holy Family Parish Church in Freeburg, Missouri; (2) seeking enforcement of Respondents' self-asserted "right to conduct the business and government of the said Church" through an accounting of parish funds; and (3) seeking, by declaratory judgment, a decree that Respondents "are empowered with the authority to control the physical changes in the (Church) building and its contents including, but not limited to, the above-described altars" (L.F., pp 1-5).

An ex parte restraining order was issued by the Trial Court restraining the Bishop and Pastor from removing the main altar and two side altars and from rearranging the Altar of Sacrifice in Holy Family Catholic Church (L.F.33). This temporary restraining order was subsequently modified. On September 15, 1978, a new order was entered which enjoined them from removing the main altar, from removing the side altar tops to a place outside the property of Holy Family Catholic Church and from destroying or disposing of the altar tops, and further mandating them to protect,

preserve and store safely the altar tops. The reredos or side altar tops had been removed prior to the filing of the Petition. (L.F. 14, 15, and 33.)

The matter was tried before the Court on December 12, 1980 (L.F. 35) and on June 15, 1982 Judgment was entered permanently enjoining the Appellant Bishop from removing the "main altar from its site in the sanctuary of Holy Family Parish Church" and mandating the Appellants to restore "the complete two side altars with reredos" (L.F. 23-32).

On July 22, 1982 an appeal was taken to the Missouri Court of Appeals, Eastern District. On September 6, 1983 the Court of Appeals issued its opinion reversing the judgment of the trial court. Struemph et al. v. McAuliffe, 661 SW 2d 559, (Mo. App. 1983). On January 17, 1984, the Supreme Court of Missouri denied the Application to Transfer. Subsequently this Petition for Writ of Certiorari was filed.

SUMMARY OF ARGUMENT

The state court's decision is in harmony with the decisions of this court in Serbian and Jones.

The issue is over the arrangement for worship of the altar and the sanctuary of a Catholic Church. This is clearly a matter of liturgy. Under the First and Fourteenth Amendments civil courts are prohibited from interfering in such ecclesiastical matters.

Even if the issue were one of property rights, the Catholic Church is hierarchical and ownership and control of property is vested in the bishop and not the members. Under Jones, a state may adopt a rule of deference to decisions of a hierarchical church.

Even if the "neutral principles approach" of Jones is applied, the deeds and church constitutions and laws clearly reveal that the property is held subject to the control of the hierarchy of the Church and not the Petitioners.

Thus the Petition should be denied.

ARGUMENT

The Petition for Writ of Certiorari should be denied because: The questions decided by the state court of appeals had been previously settled by this Court and the court of appeal's decision is in harmony with the prior decisions of this Court.

Two decisions of this Court are dispositive of the issues presented below. They are: Serbian Eastern Orthodox Diocese of the United States of America and Canada et al. v. Milivojevich et al., 426 U.S. 696 (1976) and Jones v. Wolf, 443 U.S. 595 (1979).

In Serbian, this Court restated a long standing principle that ecclesiastical matters, that is, matters of doctrine, form of worship (liturgy), church government (polity), or membership are outside the jurisdiction of civil courts. Indeed, the First and Fourteenth Amendments prohibit civil court interference in such matters.

This Court stated in Serbian, 426 U.S. at pages 708-709:

"Consistently with the First and Fourteenth Amendments '[c]ivil courts do not inquire whether the relevant [hierarchical] church governing body has power under religious law [to decide such disputes]. . . . Such a determination . . . frequently necessitates the interpretation of ambiguous religious law and usage. To

permit civil courts to probe deeply enough into the allocation of power within a [hierarchical] church so as to decide . . . religious law [governing church polity] . . . would violate the First Amendment in much the same manner as civil determination of religious doctrine.' Md. and Va. Churches v. Sharpsburg Church, 396 U.S. 367, 369 (1970) (Brennan, J., concurring). For where resolution of the disputes cannot be made without extensive inquiry by civil courts into religious law and polity, the First and Fourteenth Amendments mandate that the civil courts shall not disturb the decisions of the highest ecclesiastical tribunal within a church of hierarchical polity, but must accept such decisions as binding on them, in their application to the religious issues of doctrine or polity before them." (Brackets and ellipses original.)

More succinctly, this Court said in Serbian at pages 721-722,

"Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 116 (1952), stated that religious freedom encompasses the 'power [of religious bodies] to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine'."

In Jones, the issues did not involve liturgy or polity but a dispute over church property. This Court enunciated the so-called "neutral principles approach" to settling property disputes on the basis of (a) the language of deeds, (b) the terms of local church charters, (c) state statutes governing the holding of church property and (d) the provisions of the constitution of the general church concerning property. Jones, *supra*. at page 603.

In Jones, this Court held that a state may adopt the "neutral principles approach" or a rule of "compulsory deference to religious authority" or "any one of various approaches for settling church property disputes so long as it involves no consideration of doctrinal matters, whether the ritual in liturgy of worship or the tenents of faith." Jones, *supra*, at page 602 (quoting Maryland and Virginia Churches, 396 U.S. at 368).

Thus there are three basic questions to be asked by a court reviewing issues like those presented in this case. (1) Is the issue an ecclesiastical matter, that is, one of church liturgy, polity, membership, etc. or merely a question of the ownership and control of property? If the issue is one of ecclesiastical matters then civil courts have no jurisdiction. If it is merely a property dispute, then the second question is posed. (2) Should the court adopt a rule of compulsory deference to religious authority or apply the "neutral principles approach"?

The rule of deference is a permissible option for the Court and is especially appropriate in dealing with a hierarchical church which, by its form of government, places the ownership and control of property in the ecclesiastical superiors. If the neutral principles approach is adopted by the Court, then the third step of applying the four tests is in order. (3) The subquestions are: (a) what is the language of the deeds? (b) What are the terms of the local church charter? (c) What are the state statutes governing the holding of church property? (d) What are the provisions of the constitution of the general church?

The State Court of Appeals posed each of these three inquiries and, at each fork in the road, moved on to consider both of the options.

Question One: As to the question of whether or not this was an ecclesiastical matter, i.e., one of liturgy or church polity, the state court of appeals noted the Respondents' position that the altars are an essential part of worship and the controversy is purely ecclesiastical. The state court of appeals then stated, "Without actually deciding the same to be true, this Court will consider the case as if it involves a property right." Struemph, supra, at 563.

Thus, rather than decide the case on the basis of ecclesiastical matters, the state court of appeals went on to the second question.

Since the decision of the state court of appeals reversing the trial court is correct even if the court had relied solely on the ecclesiastical matters basis, we shall digress briefly to point this out because this basis was not discussed in the state court's opinion.

Altars have been the center of worship for many religious groups, from the most primitive pagan rites to the most current religious groups. The altar is the center of religious worship for many sects of Christians, Jews, Moslems, Buddhists and others.

It is around the altar that the Catholic community celebrates the mystery of the Eucharist (Holy Mass, the Lord's Supper).

"The altar of sacrifice should be placed and constructed so that it is always seen to be the sign of Christ himself, the place at which the saving mysteries are carried out and the center of the assembly, to which the greatest reverence is due.' . . . 'The altar, where the sacrifice of Christ is made present under sacramental sign, is always the table of the Lord. People of God are called together to share in this table. Thus, the altar is a center of the thanksgiving accomplished in the eucharist.' . . . 'The altar should remind us that the Mass . . . is at the same time and inseparably a

sacrifice, in which the sacrifice of the cross is perpetuated; a memorial of the death and resurrection of the Lord; and a sacred banquet in which through the Communion of the body and blood of the Lord the people of God share the benefits of the pascal meal, renew the new covenant which God has made with men once for all through the blood of Christ and in faith and hope foreshadow and anticipate the eschatological banquet in the kingdom of the Father, proclaiming the Lord's death until his coming.'

... 'Thus, the altar is both a symbol of Christ in the midst of his assembled people and the place of sacrifice. As such, its very position and construction should immediately attract the attention of the faithful who enter the edifice.'

THUS WE HAVE THE MEANING OF THE UNITY AND CENTRALITY OF THE ONE ALTAR OF SACRIFICE IN EACH CHURCH. TWO OR MORE ALTARS, EVEN SIDE ALTARS, CAN ATTRACT, DISTRACT, OR TAKE AWAY FROM THIS VERY BASIC LITURGICAL CONCEPT AND MEANING." (Dfs. Exh. K, "Guidelines for Building or Renovating Churchs," p. 5, paragraph 26, Underlining and caps original.)

Nearly every detail of the Eucharistic celebration around the Altar is covered by Church liturgical directives.

The issue is not the ownership or possession of the altars or reredos, but how the Sanctuary of Holy Family Catholic Church will be arranged for worship. Even if the Petitioners' brought their own altar to church each Sunday, they could not through a civil court compel the use of that altar in the liturgy.

The Catholic Church, through its hierarchy, has made the liturgical decision to arrange churches so as to center the focus of attention on one Altar of Sacrifice and to remove or modify things which distract from the full participation of the people on the celebration of the Eucharist. For a civil court to substitute its or the Petitioners' judgment as to the arrangement of the Sanctuary would be to play Bishop, to usurp directly the authority of the hierarchy over liturgical matters and to trample on Free Exercise of Religion.

Had the state court of appeals reversed the judgment of the trial court on the grounds that arrangement of the altars in the Sanctuary of Holy Family Church was an ecclesiastical matter, then such decision would have been fully in accord with this Court's prior decisions.

Question Two: However, the state court of appeals moved to the second question and concluded that the Catholic Church is hierachial and that title and control of property is vested in the hierarchy and therefore the rule of deference to the established structure

and polity of a hierachial church was appropriately applicable. The court relied upon a rule long established in Missouri, Klix v. Polish Roman Catholic St. Stanislaus Parish, 137 Mo. App. 347, 118 S.W. 1171 (1909). See Struemph, supra, pages 564 to 566. This decision was in accord with this Court's decisions in Serbian and Jones.

Question Three: Again the state court of appeals gave Petitioners the benefit of the doubt and went on and considered the application to this case of the "neutral principles approach" as developed in Jones.

(a) The deeds in the record grant fee simple title to the Bishop and his successors in office without restriction, reservation or trust limitations.

(b) Holy Family Church has no local charter. (In a purely hierachial church, the parish does not have autonomy.) If one considers the Parish Council's Articles and By-Laws as a charter, they expressly recognize that the governing authority is in the pastor and the bishop, not the Council which is merely advisory. (Dfs. Exh. A).

(c) There are no Missouri statutes governing the holding of church property.

(d) The Canon Laws of the Catholic Church clearly place supreme authority over both temporal (worldly) and spiritual matters in the Bishop. (Dfs. Exh. C, Canon Laws).

Having concluded its consideration of the "neutral principles approach", the state court of appeals stated, "...scrutiny of the documents in purely secular terms provides no basis for finding any control of that property to be vested in the parishioners. Such scrutiny of the Canons offered in evidence clearly reveals that the property is held subject to the control of the hierarchy of the church." Struemph, *supra*, at page 567. Thus, the State Court doubly complied with the rulings of Jones.

It should be briefly noted that Petitioners, on a number of occasions in their Petition, used terms such as "arbitrary or fraudulent" (e.g. Petition, page 12) obviously with the intent to mislead this Court by implication that some action of the Respondent was arbitrary or fraudulent. Such implication, whether intentional or negligent, is not only totally devoid of fact but outrageous.

The decisions of the Bishop to remove the reredos from the side altar and otherwise rearrange the Sanctuary of Holy Family Church for the celebration of liturgy was made entirely in accord with the laws and regulations of the Catholic Church. (Note the documents quoted above.) Petitioners simply oppose the changes in liturgical practice of the Catholic Church.

Whenever any organization makes changes, there are some who agree and others who disagree. Petitioners obviously disagree with the liturgical

decisions of the Bishop and Pastor as to their parish church and want to control such decisions themselves in the future. One may have understanding for their feelings, but for a civil court to enforce their liturgical preferences in contradiction to ecclesiastical constitutions and decisions of church leaders would be to salve Petitioners' feelings at the price of trampling upon the Free Exercise of Religion.

CONCLUSION

Therefore, Respondent submits that the Petition for Writ of Certiorari should be denied because the decision of the state court of appeals was in harmony with the settled legal principles enunciated by this Court in Serbian and Jones.

Respectfully submitted,

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